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IN THE

Supreme Court of the United States

October Term, 1965

No. 345

RONALD R. CICHOS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

APPENDIX TO PETITION FOR A WRIT CERTIORARI TO THE SUPREME COURT OF INDIANA

JOHN P. PRICE,
CLEON H. FOUST,
Indianapolis, Indiana,

WARREN BUCHANAN,
JOHN B. McFADDIN,
Rockville, Indiana,
Attorneys for Petitioner.

HOLLOWELL, HAMILL & PRICE,
515 Circle Tower Building,
Indianapolis, Indiana,
Of Counsel.

Central Publishing Company, Inc., Indianapolis, Ind.

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October Term, 1965

No. ———

RONALD R. CICHOS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

APPENDIX
ORIGINAL OPINION OF THE SUPREME COURT OF INDIANA

No. 30,482

July 6, 1965

Before Achor, Judge

Plaintiff Ronald R. Cichos v. State of Indiana

Appellant was previously charged in two counts. (1) Involuntary Manslaughter, and (2) Reckless Homicide. He was convicted on the latter charge—the verdict was silent as to the charge of the first count. Said judgment was ap-

pealed to this court, which reversed the judgment with instructions to grant appellant a new trial.

Appellant was again charged with (1) Involuntary Manslaughter and (2) Reckless Homicide, and the resultant verdict was the same as that which resulted from the first trial.

In this, his second appeal, appellant urges six propositions of law which will be considered in the order in which they are presented in appellant's brief.

One: Appellant urges that the trial court committed reversible error by permitting the state to prosecute him a second time for either involuntary manslaughter or reckless homicide, for the reason that in the original trial the jury, by failing to make a finding as to the charge of involuntary manslaughter, impliedly had acquitted appellant on that charge, and further, since the factual circumstances involved in the charge for reckless homicide were the same infractions of the law as were involved in the count for involuntary manslaughter, the jury, therefore, having determined that appellant was not guilty of a crime involving these alleged acts, could not subject him a second time to a criminal charge involving the same infractions.

Admittedly there is substantial authority that silence as to one count of several counts of an indictment is equivalent to a verdict of not guilty on the count.

Smith v. State (1951), 229 Ind. 546, 99 N. E. 2d 417;

Ward v. State (1919), 188 Ind. 606, 125 N. E. 397;

Beaty v. State (1882), 82 Ind. 228;

Harvey v. State (1881), 80 Ind. 142;

Bryant v. State (1880), 72 Ind. 400;

Bonnell v. State (1878), 64 Ind. 498;

Weinzorflin v. State (1884), 7 Blackf. (Ind.) 186;

Ewbanks, Indiana Criminal Law Sec. 445, p. 282.

Also, the cases generally make no distinction as to whether the numerous counts are lesser included offenses, greater offenses, or merely different charges concerning the same transaction. In the leading case of *Weinzorflin v. State, supra,* the doctrine of silence being equivalent to an acquittal was promulgated with reference to the common law doctrine that a jury could not be dismissed until its facts from a situation where the court could judicially know that a verdict was returned. That case, however, distinguishes charges of the same offenses.

The distinction drawn in *Weinzorflin v. State, supra,* although supported by substantial logic, was not long observed, and the axiom, silence means acquittal, soon came to be applied with no regard as to whether the count on which the verdict was silent was a greater or lesser included offense or a different charge for the same unlawful transaction. See: *Beaty v. State, supra.* On the other hand, the logic of the principle which states silence is equal to an acquittal is perhaps made inappropriate to charges of these offenses, related to the same unlawful transaction, especially since this court judicially knows the trial court practice of telling the jury to return a verdict on only one of the charges in view of the limitation on penalty.

Rather than treat the silence of the jury in the involuntary manslaughter count in this case as an acquittal, the better result would seem to be to hold that the reckless

homicide verdict encompassed the elements of involuntary manslaugther,[1] and that appellant was simply given the lesser penalty.

Two: Under the state prohibition against double jeopardy (Constitution of Indiana, Art. 1, Sec. 14), as interpreted by the courts, the fact situation here involved does not present a case of double jeopardy.

State v. Balsley (1902), 159 Ind. 395, 65 N. E. 185;

Patterson v. State (1880), 70 Ind. 341;

Veatch v. State (1878), 60 Ind. 291;

Mills v. State (1875), 52 Ind. 187;

Ex Parte Bradley (1874), 48 Ind. 548;

Joy v. State (1886), 14 Ind. 139;

Weinzorpflin v. State, supra;

Morris v. State (1819), 1 Blackf. (Ind.) 37; accord;

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[1] ***Reckless Homicide*** **"Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000), or by imprisonment in the state farm for a determinate period of not less than sixty (60) days and not more than six (6) months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars ($1,000) and imprisonment in the state prison for an indeterminate period of not less than one (1) year or more than five (5) years."**

Acts 1963, ch. 282, Sec. 1, p. 458 (being Burns' Ind. Stat. Anno. Sec. 47-2001 (2) (1964 Supp.))

Involuntary Manslaughter. **"Whoever . . . kills any human . . . involuntarily in the commission of some unlawful act, is guilty of manslaughter, and on conviction shall be imprisoned not less than two (2) years nor more than twenty-one (21) years."**

Acts 1941, ch. 148, Sec. 2, p. 447 (being Burns' Ind. Stat. Anno. Sec. 10-3405 (1956 Repl.)).

State ex rel. Lopez v. Killigrew (1931), 202 Ind. 397, 174 N. E. 808.

The Balsley case, *supra,* is substantially similar to the present controversy. In that case, appellee was tried on an indictment of two counts. One charged embezzlement and the other larceny. The jury verdict found appellee guilty of larceny but was silent as to the embezzlement count. Subsequently the larceny conviction was reversed on appeal and a new trial granted. Appellee, charged again with both larceny and embezzlement, filed a plea of abatement as to the embezzlement count claiming former jeopardy. A demurrer to the plea was overruled, but on appeal, this court reversed the overruling of the demurrer with a singularly appropriate discussion of double jeopardy. This court at page 397 stated:

> "The rights of the defendant and the State upon a new trial are clearly defined by statute: 'A new trial is a re-examination of the issues in the same court. The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict cannot be used or referred to, either in the evidence or argument.' Sec. 1909, 1910, Burns 1901 (now Burns Ind. Stat. Anno. Sec. 9-1901, 9-1902 (1956 (Repl.))
>
> "It is entirely clear that when the appellee asked for and obtained a new trial of the issues in his case, the results of the previous trial were wholly vacated. He could not, under the indictment, take a new trial as to the issue upon one count, and not upon the other. If he obtained a new trial, he was bound to take it upon the terms and conditions of the statute, and one of those conditions was that 'the parties should be placed in the same position as if no trial had been had.' This point has been decided in many cases in this State, and must be considered as settled." (Citing cases.)

Three: Appellant finally contends that retrial under both counts of the indictment constituted double jeopardy as prohibited by the Fifth Amendment and the due process clause of the Fourteenth Amendment to the U. S. Constitution.

Appellant asserts that, despite the established Indiana law on this issue, a change in Indiana law is compelled by *Green v. United States* (1957), 355 U. S. 184, 2 L. Ed. 2d 199. However, among other facts which must be considered in relation to this assertion is the fact that the Green case was a federal case and therefore the rule enunciated arose under the U. S. Supreme Court's supervisory power over federal courts. The Green case involved a re-trial on a murder charge, and resulted in a verdict of guilty of first degree murder, after a prior trial which had resulted in a second degree murder conviction had been reversed on appeal. Applying the Fifth Amendment double jeopardy provision, the Supreme Court held that a conviction of a lesser included offense amounted to an acquittal of the greater offense. Consequently, they reasoned that, on retrial, the accused could be tried for no greater charge than that for which he was originally convicted.

Aside from the obvious fact that the Green case, *supra*, involved the application of federal law and federal standards, there is the distinction concerning the character of the charges twice in issue. The offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involuntary manslaughter.

Since the elements of both counts are almost identical, it is recognized that a verdict of guilty of reckless homicide

does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter for constitutional reasons as would be the case when a conviction is had on a lesser included offense. See Burns Ind. Stat. Anno. Sec. 47-2002 (1956 Repl.)

When dealing with such interconnected offenses it is almost futile to attempt to sort out error and reverse a case only as to those errors which affected the defendant. Recognizing this futility, this state has accepted the position adopted by a substantial number of states, that when a defendant initiates an appeal asking for a new trial and the appeal discloses error, the original trial is treated as a total nullity, leaving the parties as they were prior to the proceeding tainted with error. Burns Ind. Stat. Anno. Sec. 9-1902 (1956 Repl.) Compare: *Green v. United States, supra,* 355 U. S. 184, 216 n. 4; 2 L. Ed. 2d 199, 220, n. 4 (dissenting opinion).

The protection against double jeopardy has never specifically been incorporated within the scope of the due process clause of the 14th Amendment, supra, by the Supreme Court.[2] Arguable, the double jeopardy provision is not necessarily a hallmark of either system, and it is reasonable to assume that some limitation on the total incorporation of the Fifth Amendment within the due process clause of the 14th Amendment may still exist.

In view of the diverse reasoning by many of the states concerning double jeopardy in situations similar to the instant case, it does not appear that the federal standard

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[2] The broad language in Malloy v. Hogan (1964), — U.S. —, 12 L. Ed. 2d 653, indicates a future possibility of such incorporation. See also: Hoag v. State of New Jersey (1958), 356 U.S. 464, 2 L. Ed. 2d 913 (five to three decision by Harlan, J., Warren, C. J., Douglas and Black, JJ., dissent).

of double jeopardy in *Green v. United States, supra,* can be deemed so fundamental a concept of ordered liberty as to compel a total revision of state interpretations of the doctrine, which interpretations of their own constitutions are primarily the prerogative of the states.

Judgment sustained.

Jackson, C. J. and Landis, J., concur in result.

Arterburn and Myers, JJ., concur.

ON PETITION FOR RE-HEARING IN THE SUPREME COURT OF INDIANA

No. 30,482

October 1, 1965

Before Achor, Judge

Plaintiff Ronald R. Cichos v. State of Indiana

Appellant has filed a petition for rehearing in which he asserts that this court, in its opinion as written, erred in two particulars.

First: That this court failed to comply with the requirements of Art. 7, Sec. 5 of the Indiana Constitution by failing to "give a statement in writing of each question arising in the record and the decision of the decision of the court thereon." It is not that this court has presumed to disregard this constitutional provision, but since the provision is merely directive and does not involve any substantive rights of the litigants involved, we have given it a reasonable construction consistent with the obviously intended purpose thereof. Accordingly we have limited our discussion to the principal contentions in the case, which, incidentally, were the issues discussed in oral argument.

We intentionally omitted from our discussion those "questions arising in the record" which seem frivolous, were not supported by substantial argument in the briefs or were so patently contrary to the well-established law of the state since a discussion thereof would merely constitute an unjustifiable encumbrance of the reported decisions of the state without making any contribution to the general body of the law.

Strong precedent has been established supporting the position that this *constitutional* provision is to be given reasonable rather than a literal construction. As stated by this court in *State ex rel. Sluss v. Appellate Court of Indiana* (1938), 214 Ind. 686, at 691-692, 17 N. E. 2d 824:

> "The constitutional provision quoted above (Art. 7, Sec. 5) must have, however, a reasonable interpretation as well as a practical application. It is not to be presumed that the framees of that document intended that this court should be required to exhaust every subject that might be raised on an appeal, without regard to its importance in the determination of the cause.
>
> 'In the case of *Willets v. Ridgway* (1857), 9 Ind. 367, 369, 370, Perkins, J., speaking for this court, said:
>
> 'It is true that the constitution, by an unwise provision, requires that this Court shall give a written opinion upon every point arising in the record of every case—a provision which, if literally followed, tends to fill our Reports with repetitions of decisions upon settled, as well as frivolous, points and often introduce into them, in the great press of business, premature and not well considered opinions, upon points only slightly argued; yet it is a provision not to be disregarded, though merely directory, like that requiring the legislature to use good *English*. But though the provision is not to be disregarded, *it is to be observed*

> ***according to some construction, and should receive such a one as to obviate*** its inconvenience and objectionable character, as far as consistently can be done.' " (our emphasis.)

Furthermore, in a more recent case, when confronted with circumstances very similar to those existing in the present case, this court in *Appelby v. State* (1943), 221 Ind. 544, at pp. 549-550, 48 N. E. 2d 646 (reh. den. 49 N. E. 2d 533), stated:

> "The appellant's motion for a new trial occupies forty-five (45) of the six hundred sixty-eight (668) pages of their printed brief. Sixty-six (66) separate and distinct legal propositions are presented for our determination. We cannot bring ourselves to believe that the framers of our State Constitution had any such situation in mind when they enjoined upon us the obligation to 'give a statement in writing of each question arising in the record' (Article 7, Section 5), or when they imposed upon the General Assembly the duty to provide for the 'speedy publication of the decisions' of this court (Article 7, Section 6). At the risk of being charged with failing to meet our responsibilities, *we feel obliged to limit our consideration of this case to what appear to be the principal contentions.* We have pointed out in the past that one prejudicial error clearly presented is enough to accomplish a reversal by this court. *Weer v. State* (1941), 219 Ind. 217, 36 N. E. 2d 787, 37 N. E. 2d 537." (our italics)

In other instances this court has applied the rule of reason to the above constitutional directive by providing that the court need not give a statement in writing of each question arising in the record, unless the parties have filed briefs and therein presented substantial argument regarding the issue so as to aid the court in making its decision regarding the questions presented by the record in such

case. Furthermore, as above noted, we have held that in reversing a case we need only discuss a single issue arising in the case which sustains the decision of this court.

In this case we have limited our consideration to those issues which we considered to be substantial questions and this we have endeavored to do in a comprehensive manner.

To demonstrate our reason for not discussing the other many specifications assigned as error, we make the following comment with regard to a few of such specifications, which are illustrative of those asserted in appellant's petition for rehearing. Appellant's Proposition II, Point 1, urges that the trial court committed prejudicial error by permitting State's Exhibit No. 3 to be admitted in evidence. Appellant claims that this exhibit, which was a photograph of one of the automobiles involved in the collision, was erroneously admitted because the body of one of the decedents was hanging from the wreckage and therefore the exhibit was calculated only to inflame the jury and served no other purpose. In support of his contention, appellant cites the case of *Kiefer v. State* (1958), 239 Ind. 103, 153 N. E. 2d 899. However, examination of that case reveals that it does not support appellant's contention but, rather, justifies the admission of the evidence since the picture was an unaltered part of the res gestae of the case.

Appellant's Proposition II, Point 2, urges that the trial court committed error in permitting the state's witness to describe a conversation which he had with a witness for the defense shortly after the accident and out of the appellant's presence. Appellant claims error with regard to the admission of such evidence notwithstanding the fact that said testimony was admitted explicitly for the purpose of impeaching the defense witness, pursuant to the

foundation which was laid in the cross-examination of said witness. The alleged error is contradicted by the well established law of this state as it has existed for 145 years.

In the early case of *Shields v. Cunningham* (1820), 1 Blackf. 86, at p. 87, this court stated:

> "We consider this to be the correct doctrine: Where a witness has, at other times and places, made statements repugnant or contradictory to those delivered in Court, and relative to facts material to the issue, the adverse party has a right to prove that circumstance in order to discredit the witness, or diminish the weight of his testimony; . . ."

The credibility of a witness, party, or accused may be attacked by showing that at another time and place he made an oral or written statement inconsistent or contradictory to his testimony. See: *Pollard v. State* (1950), 229 Ind. 62, 94 N. E. 2d 912. See also: Wigmore on Evidence, Sec. 884, p. 376.

In the present case other specifications involved numerous instructions tendered by the appellant on the subject of mere negligence as related to the charge of involuntary manslaughter or reckless homicide. The court's own instructions adequately covered this subject, and it was not therefore necessary for the court to read all of the appellant's array of instructions which would have, if given, had the effect of over-emphasizing the subject of "mere negligence" as an element in the case.

Likewise, appellant complains that the court did not give numerous instructions on the subject of reasonable doubt. This subject was also adequately presented by the court's own instructions. In fact, one of appellant's instructions, which the court refused to give, was given

verbatim by the court as one of his own instructions. The absence of any merit to these specifications is so patent that no discussion seemed necessary.

Furthermore, appellant's Proposition II, Point 2, urges that the trial court erred in giving its instruction No. 2. True, appellant has engaged in a lengthy dissertation in his brief regarding this instruction. Although the instruction is subject to some rhetorical weakness, we cannot say that it was legally incorrect or that the jury was mislead thereby. As demonstrated in appellee's brief, this instruction is supported by the case law of the state, and appellant has not favored us with a reply brief which refutes the conclusiveness of this authority.

As previously stated, the above specifications of error were not previously considered by this court in its opinion but were omitted because they were patently without merit, and although the constitution provides that the court "give a statement in writing of *each question* arising in the record" of such case, we are of the opinion that the law is so firmly established with regard to the specifications of error asserted by appellant that there is, in reality, no substantial question with regard to such specifications and, therefore, that within a reasonable construction of the constitutional directive it was unnecessary that the court encumber the opinion which a discussion of this voluminous subject matter.

Secondly: Appellant reasserts that the verdict against him is void for the reason that the implied finding of not guilty in the prior trial with respect to the charge of involuntary manslaughter requires the conclusion that appellant was also not guilty of reckless homicide, both of which offenses involved the same acts on his part. This

issue was fully considered, and we believe correctly so, in the opinion as written.

Rehearing denied.

Arterburn & Myers, JJ., concur.

Jackson, C. J. & Landis, J., concur in the result.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV—Citizenship; Privileges and Immunities, Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Burns Indiana Statutes, Annotated, Section 9-1901

"*Definition*: A new trial is a re-examination of the issues in the same court. (Acts 1905, ch. 169, Sec. 280, 584."

Burns Indiana Statutes, Annotated, Section 9-1902

"*Effect of granting—Former verdict not to be referred to in argument.*

"The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict can not be used or referred to, either, in the evidence or in the argument. (Acts 1905, ch. 169, Sec. 281, p. 584)"

Burns Indiana Statutes, Annotated, Section 47-2001

"Driving—(a) Reckless Homicide. Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one Hundred dollars ($100) or more than one thousand dollars ($1,000) or by imprisonment in the state farm for a determinate period of not less than sixty (60) days and not more than six (6) months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars ($1,000) and imprisonment in the state prison for an indeterminate period of not less than one (1) year or more than five (5) years."

Burns Indiana Statutes Annotated, Section 10-3405

"*Manslaughter—Penalty.* Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, or involuntarily in the commission of some unlawful act, is guilty of manslaughter, and on conviction shall be imprisoned not less than two (2) years nor more than twenty-one (21) years. (Acts 1941, ch. 148, Sec. 2, p. 447)"

DEFENDANT'S VERIFIED SPECIAL PLEA OF FORMER JEOPARDY

(R. P. 83-94)

Comes now the defendant, Ronald Richard Cichos, by his counsel, Warren Buchanan and John B. McFaddin, and for an additional special plea herein, alleges and says:

1. That on November 6, 1958, a second amended affidavit in this cause was filed in the Parke Circuit Court; that in said second amended affidavit this defendant was charged in two counts with the statutory offenses of reckless homicide, by count 1 thereof, and involuntary manslaughter, by count 2 of said second amended affidavit; that a bench warrant was issued by the Parke Circuit Court for the arrest of said defendant on said charges; that this defendant was thereupon arrested and held to answer to said charges; that a copy of the second amended affidavit herein charging this defendant with such offenses; certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit "A".

2. That by its terms, said second amended affidavit charged that this defendant on September 28, 1958, in Parke County, Indiana, committed the offenses of reckless homicide and involuntary manslaughter by then and there, unlawfully and feloniously, operating a motor vehicle upon and a long a highway at and in the County of Parke, in

the State of Indiana, while under the influence of intoxicating liquor, and that the said defendant then and there drove and operated his said automobile into and against an automobile then and there driven and operated on said highway and in and on which one Frank Glen Barber and Shella Mae Barber were then and there riding and that the said Frank Glen Barber and Shella Mae Barber were injured and wounded as a result of such collision and that they died as a result thereof on September 28, 1958.

3. That the defendant was arraigned in the Parke Circuit Court, before the judge thereof, on November 24, 1958, and entered a plea of not guilty to the charges of reckless homicide and involuntary manslaughter as contained in said second amended affidavit.

4. That during the months of November and December, 1959, this cause was tried in the Parke Circuit Court, and that the jury, at the trial of said cause, returned a verdict finding the defendant guilty of reckless homicide, as charged in said second amended affidavit that the jury, at the trial of said cause, did not return a verdict finding the defendant guilty of involuntary manslaughter, as charged in count 2 of the second amended affidavit herein; that the Court rendered judgment of conviction and sentence on the verdict in this cause on February 16, 1960; that the defendant filed a motion for new trial in said cause, and that such motion was over-ruled by the Court; that on August 12, 1960, and within the time granted by the Supreme Court of Indiana for such purpose, the defendant filed a transcript of the record and assignment of errors on an appeal of said conviction to said Supreme Court of Indiana; that on July 2, 1962, the Supreme Court of Indiana reversed the judgment of conviction of the defendant and this cause was remanded to this Court

with instructions to sustain defendant's motion for new trial; that this cause is now assigned for re-trial in this Court for June 13, 1963; that a copy of the verdict returned by the jury herein finding the defendant guilty only of the offense of reckless homicide, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit "B".

5. That the defendant is now charged with the statutory offenses of reckless homicide and involuntary manslaughter, as charged in counts 1 and 2, respectively, of the second amended affidavit herein; that the jury in the original trial of this cause, by failing to return a verdict as to the second count of the second amended affidavit herein, by implication, acquitted the said defendant of the charge of involuntary manslaughter.

6. That the prior prosecution and acquittal of the defendant on the charge of involuntary manslaughter would now bar any further prosecution of said defendant based upon the same crime.

7. That the facts necessary to convict the defendant on count 2 of the second amended affidavit now pending in this Court were adjudicated by the failure of the jury at the prior trial of the same to return a verdict on said count, thus acquitting said defendant of said crime; that the defendant cannot be placed in jeopardy, the second time, for the same offense; that prosecution to a final judgment of the offense in the prior trial of the same is a bar to his prosecution as to the second count of the second amended affidavit now pending in this Court.

WHEREFORE, The defendant prays that the charge of involuntary manslaughter as set forth in the second

count of the second amended affidavit now pending against him be dismissed.

RONALD RICHARD CICHOS, Defendant, By:

SECOND AMENDED AFFIDAVIT

COUNT 1

For Count 1—

Jay W. Dennis being duly sworn upon his oath, says:

That Ronald Richard Cichos, on the 28th day of September, 1958, at and in the County of Parke, in the State of Indiana, did then and there unlawfully and feloniously drive and operate a certain motor vehicle, to-wit: a Cadillac automobile, on United States Highway No. 36 and said highway was then and there of sufficient width for two lanes of automobile traffic and was then and there maintained as a two-lane highway in the County of Parke and State of Indiana aforesaid, with reckless disregard for the safety of others by then and there operating his said automobile while under the influence of intoxicating liquor and by then and there driving and operating his said automobile on the half of said highway to his left and into and against an automobile in which Frank Glen Barber and Shella Mae Barber were then and there riding and the said Barber automobile was then and there driven and operated in its right half of said United States Highway No. 36, and the said Ronald Richard Cichos did then and there and thereby cause the death of the said Frank Glen Barber and Shella Mae Barber, and the said unlawful, reckless and wanton acts aforesaid of the said Ronald Richard Cichos was the proximate cause of the deaths of the said Frank Glen Barber and Shella Mae Barber, contrary to the form of the statutes in such cases made and pro-

vided and against the peace and dignity of the State of Indiana.

(Signed) Jay W. Dennis

COUNT 2

For Count 2—

Jay W. Dennis being duly sworn upon his oath, says:

That Ronald Richard Cichos on the 28th day of September, 1958, at and in the County of Parke, in the State of Indiana, did then and there unlawfully and feloniously without malice either expressed or implied and involuntarily did kill Frank Glen Barber and Shella Mae Barber, human beings, by then and there unlawfully and feloniously driving and operating a motor vehicle, to-wit: a Cadillac automobile and in and upon and along a certain highway at and in the County of Parke, and State of Indiana, to-wit: United States Highway No. 36 while he, the said Ronald Richard Cichos was then and there under the influence of intoxicating liquor and the said Ronald Richard Cichos did then and there unlawfully and feloniously, while under the influence of intoxicating liquor, drive and operate said automobile into and against an automobile then and there driven and operated on the said United States Highway No. 36 and in and on which the said Frank Glen Barber and Shella Mae Barber were then and there riding and said Ronald Richard Cichis did then and there unlawfully and feloniously but involuntarily and without malice, inflict mortal wounds and injuries in and upon the bodies of the said Frank Glen Barber and Shella Mae Barber, of which they sickened and lanquished and from which mortal wounds did die on September 28, 1958 at and in the County

of Parke and State of Indiana, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Indiana.

(Signed) Jay W. Dennis

Verdict

We, the jury, find the defendant guilty of Reckless Homicide as charged in County One of the Affidavit and find his age to be 26 years.

/s/ Dewy Hazlett
Foreman

DEMUR TO DEFENDANT'S VERIFIED SPECIAL PLEA OF FORMER JEOPARDY

(R. P. 97-98)

Comes now State of Indiana by Earl M. Dowd, Prosecuting Attorney and demur to defendant "verified special plea of former jeopardy" on each of the following grounds:

1. Said verified special plea of former jeopardy does not state facts sufficient to bar a prosecution by the State of Indiana of the defendant's on the charge of involuntary manslaughter as contained in the second count of the second amended affidavit herein.

2. Said verified special plea of former jeopardy does not state facts sufficient for the State of Indiana to dismiss the charge of involuntary manslaughter contained

in the second count of the second amended affidavit of hearing.

/s/ Earl M. Dowd

PROSECUTING ATTORNEY
68th JUDICIAL CIRCUIT OF
INDIANA

• • • • •

MEMORANDUM

By statute in the State of Indiana, Burns Indiana Statutes, Annotated replacement 9-1902 which says "the granting of a new trial places the parties in the same position as if no trial had been had." The Courts have said by way of interpretation of this statute, that it is entirely clear that when the defendant asks for and obtained a new trial of the issue the results of previous trial were wholly vacated. He cannot under the indictment take a new trial as to the issue upon one count and not upon the other. If he obtained a new trial he was bound to take it upon the terms and conditions of the statute, and one of these conditions was that the parties should be placed in the same position as if no trial had been had. This point has been decided in many cases in this state and must be considered as settled, 159 Indiana 395—202 Indiana 397.

Court's Entry on Defendant's Plea of Former Jeopardy June 12, 1963—"and the Court now sustains the demurrer of the State of Indiana to the Special Plea of Former Jeopardy by Defendant and that said verified petition does not state facts sufficient to bar the prosecution or to dismiss the same. (R. P. 99)

MOTION OF DEFENDANT FOR THE COURT TO DIRECT JURY TO RETURN VERDICT FOR THE DEFENDANT AND FOR DISCHARGE OF THE DEFENDANT AT CONCLUSION OF STATE'S CASE IN CHIEF.

(R. P. 121-123)

Comes now the defendant, by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of the prosecution's case in chief and after the prosecution has rested and before the introduction of evidence in support of the defendant's defense and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:

1. The prosecution has wholly failed to prove and establish by competent evidence beyond a reasonable doubt that the offenses alleged and charged in the 2nd Amended Affidavit, or either of them, or any offense included therein, were committed as charged in said 2nd Amended Affidavit.

2. The prosecution has wholly failed to prove and establish by competent evidence beyond a reasonable doubt the corpus delicti of the offenses of Reckless Homicide or Involuntary Manslaughter, or either of them, as charged in the 2nd Amended Affidavit.

3. The competent evidence offered by the State and admitted by the Court is not sufficient to sustain a verdict of guilty.

4. There is not a sufficient amount of competent, admissible evidence in the record from which the jury can

find that the State has proved the material allegations of either count of the 2nd Amended Affidavit beyond all reasonable doubt in accordance with Court's Preliminary Instructions Numbered 5, 7 and 8.

5. The defendant at the original trial of this case was acquitted and, by implication, found not guilty of Involuntary Manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count II of the 2nd Amended Affidavit.

WHEREFORE, the defendant asks that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd Amended Affidavit, or of any lesser degree thereof, or of any offenses included therein, and that he be discharged.

Filed in open court this 25th day of June, 1963.

RONALD RICHARD CICHOS, Defendant,

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

INSTRUCTION NO. A

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT.

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE

INSTRUCTION NO. B

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offense charged in Count II of the 2nd Amended Affidavit in this cause.

JUDGE, the Parke Circuit Court, Court's Entry on Motion for Directed Verdict June 25, 1963—"Comes defendant by his counsel and at the close of the State's case in chief, files written motion for the Court to direct jury to return a Verdict for the defendant and for discharge of the defendant at conclusion of State's case in chief. Argument heard and Court over-rules said motion." (R. P. 126)

MOTION OF DEFENDANT FOR THE COURT TO DIRECT JURY TO RETURN VERDICT FOR THE DEFENDANT AND FOR DISCHARGE OF THE DEFENDANT AT CONCLUSION OF ALL EVIDENCE IN THE CASE.

(R. P. 128-130)

Comes now the defendant, by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of all of the evidence in the case, and before argument and before the Court has instructed the jury and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:

1. The prosecution has wholly failed to prove and establish by competent evidence beyond a reasonable doubt that the offenses alleged and charged in the 2nd Amended Affidavit, or either of them, or any offense included therein, were committed as charged in said 2nd Amended Affidavit.

2. The prosecution has wholly failed to prove and establish by competent evidence beyond a reasonable doubt the corpus delicti of the offenses of Reckless Homicide or Involuntary Manslaughter, or either of them, as charged in the 2nd Amended Affidavit.

3. The competent evidence offered by the State and admitted by the Court is not sufficient to sustain a verdict of guilty.

4. There is not a sufficient amount of competent, admissible evidence in the record from which the jury can find that the State has proved the material allegations of either count of the 2nd Amended Affidavit beyond all reasonable doubt in accordance with Court's Preliminary Instructions Numbered 5, 7 and 8.

5. The defendant at the original trial of this cause was acquitted and, by implication, found not guilty of Involuntary Manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count II of the 2nd Amended Affidavit.

WHEREFORE, the defendant asks that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the

2nd Amended Affidavit, or of any lesser degree thereof, or of any offenses included therein, and that he be discharged.

RONALD RICHARD CICHOS, Defendant,

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

INSTRUCTION NO. A

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

INSTRUCTION NO. B

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offense charged in Count II of the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT.

Court's Entry on Motion to Direct Verdict June 26, 1963

"Defendant files motion for the Court to Direct Jury to Return Verdict for the defendant and for discharge of defendant at conclusion of all the evidence in this case, said

motion submitted without argument. Court overrules Defendant's motion." (R.P. 133)

MOTION IN ARREST OF JUDGMENT

(R. P. 233-235)

Comes now RONALD RICHARD CICHOS, defendant in the above-entitled cause of action by his attorneys of record, Warren Buchanan and John B. McFaddin, and as such defendant and before the State of Indiana has moved the Court for judgment on the verdict in this cause, and before judgment has been rendered in said cause, files this application in writing asking that no judgment be rendered on said verdict of the jury herein finding this defendant guilty of reckless homicide as charged in Count 1 of the second amended affidavit herein and finding his age to be 29 years and said defendant respectfully moves the court that judgment in the above-entitled cause be arrested on the following grounds, to-wit:

(1) That the facts stated in Counts 1 and 2 of the second amended affidavit herein do not constitute a public offense under the laws of the State of Indiana.

(2) That the verdict of the jury returned in this cause on June 28, 1963, purported to find the defendant guilty of the offense of reckless homicide, as charged in Count 1 of the second amended affidavit herein, and that said verdict, by implication, found the said defendant not guilty and acquitted said defendant of the charge of involuntary manslaughter as charged in Count 2 of said amended affidavit. That said verdict is contrary to law and that said verdict is fatally defective in that it purports to convict the defendant of one offense and then acquit him of another, although the offense of involun-

tary manslaughter, as charged in Count 2 of said second amended affidavit, possesses all of the elements factually and legally of the offense of reckless homicide as charged in Count 1 of said affidavit; the second amended affidavit, which was based on a single set of facts, was in two counts based on Burns' Statutes Section 47-2001(a) and Burns' Statutes Section 10-3405; a conviction of reckless homicide cannot properly exist, either simultaneously or subsequently to an acquital of involuntary manslaughter based on the same facts; accordingly, the inconsistency of the verdict herein is fatal and said verdict will not support a judgment and sentence based thereon; legal inconsistency in a verdict has the effect of making such a verdict a nullity and no judgment or conviction based thereon can be entered; the entry of a judgment or conviction on the verdict in this cause would violate the rules of collateral estoppel and double jeopardy; the verdict is one upon which no valid judgment can possibly be entered without being contrary to law.

(3) That the defendant intends to file a motion for new trial in this cause; that the present recognizance of the defendant in the amount of $4,000.00, as fixed by the Court, is adequate and that judgment should not be rendered and such present recognizance of said defendant should be continued, until the defendant has had an opportunity to file a motion for new trial herein, and for the Court to consider said motion for new trial and enter an order with regard to the same.

WHEREFORE, The defendant prays that no judgment be rendered herein on the verdict of the jury returned this day and finding said defendant guilty of reckless homicide as charged in Count 1 of the second amended affidavit herein and finding his age to be 29 years; that judg-

ment herein be arrested for a period of at least thirty (30) days following the date of the verdict of the jury herein in order that the said defendant may have a proper opportunity to file his written motion for new trial herein.

Dated and filed in open court this 28th day of June, 1963.

RONALD RICHARD CICHOS, Defendant,

DEFENDANT'S MOTION FOR NEW TRIAL

(R. P. 247-260)

Comes now Ronald Richard Cichos, the defendant in the above-entitled cause by John B. McFaddin and Warren Buchanan, his attorneys, and moves the Court for a new trial thereof for the following reasons and causes, and each of said reasons and causes, separately and severally considered, to-wit:

1. Irregularities in the proceedings of the Court, or jury, and for orders of the Court and abuse of discretion by which the defendant was prevented from having a fair trial in this, to-wit:

The Court erred in over-ruling the defendant's motion to quash counts one (1) and two (2) of the second amended affidavit upon which the defendant was tried in this cause.

2. Irregularities in the proceedings of the Court, or jury, and for orders of the Court and abuse of discretion by which the defendant was prevented from having a fair trial in this, to-wit:

The Court erred in sustaining the demurrer of the State of Indiana to the defendant's verified spe-

cial plea of former jeopardy addressed to the charge against the defendant of the offense of involuntary manslaughter as set forth in the second court of the second amended affidavit upon which the defendant was tried in this cause.

3. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling the defendant's objection to the admission into evidence of State's Exhibit 3. The basis for the defendant's original objection to State's Exhibit 3 was upon the ground and for the reason that the dead body of Mrs. Shella Barber and an empty shoe appeared in the photograph. The defendant objected to the admission in evidence of State's Exhibit 3 for the reason that the appearance of the dead body and the empty shoe in the photograph would only tend to inflame and prejudice the members of the jury without contributing anything toward showing the position of the Barber car and the defendant's car following the collision. The Court overruled the defendant's objection to the admission in evidence of State's Exhibit 3.

4. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling and in refusing to sustain the defendant's motion that the part of the photograph marked State's Exhibit 3 showing the dead body of Mrs. Shella Barber and an empty shoe be covered with blank paper to be pasted over such parts of said photograph before said photograph was exhibited to the jury.

The defendant's objection to State's Exhibit 3 and the defendant's motion with regard to the covering of

the part of the photograph marked as State's Exhibit 3 showing the dead body of Mrs. Shella Barber and an empty shoe are as follows:

"DIRECT EXAMINATION

RUFUS C. FINNEY

By Earl M. Dowd:

* * * * *

Q. And State's Exhibit 3 for purposes of identification and ask you if you can identify that:

A. Yes I can, this picture was taken also looking west at the scene of the accident. It shows a terrific amount of damage done to—received by the '53 Plymouth. Also shows one of the subjects at the scene.

* * * * *

Attorney Dowd: At this time your Honor the State is asking that these Exhibits be introduced into evidence and displayed to the Jury.

Attorney McFaddin: Defense has no objection to the introduction of what has been marked State's Exhibits 1, and 2 and 5, 6, 7 and 8, but we do object to the introduction of 3 and 4 and would like to be heard out of the presence of the Jury Judge on my reasons.

Court: Jury excused for 10, 15 or 20 minutes.

Attorney McFaddin: Withdraw our objection to State's Exhibit 4.

Court: The Court will overrule objection of defendant to Exhibit 3 and it will be admitted

Jury excused until 1:00 o'clock

Attorney Buchanan: The defendant, after his objection to the introduction into evidence of State's Exhibit No. 3 has been over-ruled, now moves the Court that the portion of the photograph indicated as Exhibit 3 showing the body of Mrs. Barber and an empty shoe be masked out of the photograph for the reason that the part of the photograph showing the body and the shoe would only tend to inflame the jury and arouse prejudice against the defendant and the part of the photograph showing the body and the empty shoe can be masked out of the photograph without effecting any part of the evidence in this cause. I think that's a reasonable request Judge, that the body be—just take a piece of paper and fasten over that with scotch tape and it would still show everything that the State has said that that should be introduced for.

Court: Well they say anything disclosed by this a witness could testify to, couldn't he testify to this position here of this car and this woman here in this position and it showed that she was dead later by determination of an inquest—I don't know how they determined she was dead, whether they determined that or not. That's one of the things they have got to prove, this woman was dead.

Attorney Buchanan: Witness has already testified that Mr. and Mrs. Barber were killed, without reference to that.

Court: Well they hold that cumulative evidence is not sufficient ground to exhibit, and also there are other things that might be shown that was shown in one of these cases, that the witness hadn't testified to it disclosed in the photograph. Well, that's the

ruling of the Court and we are ready to go ahead. The Court will overrule the objection of defendant to Exhibit 3 and we will admit the Exhibits numbered from 1 to 8 inclusive and they are to be passed to the Jury for inspection. I would submit them according to their numbers, No. 1 first and then on down the line."

5. Error of law occurring at the trial in this, to-wit:

The Court erred in permitting the State's witness, Hugh Thompson, on rebuttal, to answer the following question put to him by the Prosecuting Attorney, as a witness for the State of Indiana, on rebuttal, over the objection of the defendant which question, preliminary question by defendant, objection, ruling of the Court, and answer are as follows:

"HUGH THOMPSON

REBUTTAL EVIDENCE

DIRECT EXAMINATION

By Earl M. Dowd:

Q. I will ask you whether or not at that time Mr. Lowe did not tell you this or this in substance, that on that particular morning Ronald Cichos was drunk and intoxicated and had no business driving an automobile?

Attorney Buchanan: Just a minute Hugh. Your Honor could I ask the witness a Preliminary Question please.

Q. Mr. Thompson was Ronald Richard Cichos present at the time you had this conversation, this alleged conversation, with Mr. Lowe?

A. No sir.

Attorney Buchanan: The defendant objects to the question your Honor for the reason that the question calls for what took place in an alleged conversation between the witness and a third party out of the presence of the defendant.

Court: I don't understand that impeachment that the conversation has got to be in the presence of the defendant. I don't think that's a requirement, just it goes to the particular testimony of that particular witness. I'll overrule the objection. You can answer.

Attorney Dowd: You may answer the question. Do you want it re-read to you?

Witness: Please.

Q. I will ask you whether or not at that time Mr. Lowe did not tell you this or this in substance, that on that particular morning Ronald Cichos was drunk and intoxicated and had no business driving an automobile?

A. That's right, in substance, yes.

Q. That was the substance of the conversation between you and Mr. Lowe?

A. That's right."

6. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling defendant's motion, at the conclusion of evidence presented by the State of Indiana, and after the State of Indiana had rested its case, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit

in this cause, and in refusing to give the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said tendered instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

INSTRUCTION NO. A

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT.

7. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling defendant's motion, after the State of Indiana and the defendant had rested, and after the introduction of all of the evidence in this cause had been completed, and before argument of counsel, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give to the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

INSTRUCTION NO. B

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offense charged in Count II of the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT.

8. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 2 as requested and tendered by the defendant to which the defendant excepted.

9. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 8 as requested and tendered by the defendant to which the defendant excepted.

10. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 10 as requested and tendered by the defendant to which the defendant excepted.

11. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 13 as requested and tendered by the defendant to which the defendant excepted.

12. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 16 as requested and tendered by the defendant to which the defendant excepted.

13. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 17 as requested and tendered by the defendant to which the defendant excepted.

14. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 18 as requested and tendered by the defendant to which the defendant excepted.

15. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 19 as requested and tendered by the defendant to which the defendant excepted.

16. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 20 as requested and tendered by the defendant to which the defendant excepted.

17. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 22 as requested and tendered by the defendant to which the defendant excepted.

18. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 23 as requested and tendered by the defendant to which the defendant excepted.

19. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 24 as requested and tendered by the defendant to which the defendant excepted.

20. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 25 as requested and tendered by the defendant to which the defendant excepted.

21. Error of law occuring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 29 as requested and tendered by the defendant to which the defendant excepted.

22. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 32 as requested and tendered by the defendant to which the defendant excepted.

23. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 33 as requested and tendered by the defendant to which the defendant excepted.

24. Error in law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 34 as requested and tendered by the defendant to which the defendant excepted.

25. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruc-

tion No. 35 as requested and tendered by the defendant to which the defendant excepted.

26. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 36 as requested and tendered by the defendant to which the defendant excepted.

27. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 37 as requested and tendered by the defendant to which the defendant excepted.

28. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 38 as requested and tendered by the defendant to which the defendant excepted.

29. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 40 as requested and tendered by the defendant to which the defendant excepted.

30. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 46 as requested and tendered by the defendant to which the defendant excepted.

31. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 47 as requested and tendered by the defendant to which the defendant excepted.

32. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 48 as requested and tendered by the defendant to which the defendant excepted.

33. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 51 as requested and tendered by the defendant to which the defendant excepted.

34. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 52 as requested and tendered by the defendant to which the defendant excepted.

35. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 53 as requested and tendered by the defendant to which the defendant excepted.

36. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 2 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana:

37. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 6 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

38. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 8 as re-

quested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

39. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 15 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

40. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 18 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

41. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 19 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

42. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 2 as tendered and given by the Court on its own motion.

43. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 6 as tendered and given by the Court on its own motion.

44. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 7 as tendered and given by the Court on its own motion.

45. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 8 as tendered and given by the Court on its own motion.

46. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 10 as tendered and given by the Court on its own motion.

47. That the verdict of the jury is contrary to law.

48. That the verdict of the jury is not sustained by sufficient evidence.

Court's Entry on Motion in Arrest of Judgment and For New Trial July 16, 1963—"Hearing on motion in arrest is waived by Defendant and State and the Court now over-rules Defendant's Motion in arrest of judgment and also over-rules his motion for new trial." (R. P. 261)

APPELLANT'S ASSIGNMENT OF ERRORS

(R. P. 1)

The Appellant, Ronald Richard Cichos, says there is manifest error in the judgment and proceedings, prejudi-

cial to the Appellant, Ronald Richard Cichos, in this cause, to-wit:

1. The Court erred in overruling the Appellant's motion for a new trial.

RONALD RICHARD CICHOS, Appellant

APPELLANT'S PETITION FOR REHEARING

The appellant in the above-entitled cause prays the Court to grant a rehearing in said cause; and to that end the appellant respectfully shows to the Court that it erred in the following respects, that is to say:

1. In its written opinion upon the decision of said cause, the Supreme Court of Indiana erred in that said Court failed to comply with the requirements of Article 7, Section 5, of the Constitution of the State of Indiana by failing in said written opinion to give a statement in writing, and the decision of the Court herein, of each question arising in the record of such case, in the following particulars, to wit:

A. Specifications 3 and 4 of the Appellant's Motion For New Trial are a part of the record of this case; the error assigned on this appeal is that the trial Court erred in over-ruling the Appellant's Motion for New Trial; Specifications 3 and 4 of the Appellant's Motion For New Trial were included in the Appellant's Brief On The Assignment of Errors as Point 1 of Proposition II thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

B. Specification 5 of the Appellant's Motion For New Trial is a part of the record of this case; the Assignment of Errors on this appeal is that the trial Court erred

in over-ruling the Appellant's Motion For New Trial; Specification 5 of the Appellant's Motion For New Trial was included in the Appellant's Brief on the Assignment of Errors as Point 2 of Proposition II thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

C. Specifications 12, 13, 15, 16, 18, 19, 20, 23, 24 and 35 of the Appellant's Motion For New Trial are a part of the record of this case; the Assignment of Errors on this appeal is that the trial Court erred in over-ruling the Appellant's Motion For New Trial; these specifications were included in the Appellant's Brief on the Assignment of Errors as Point 1 of Proposition III thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

D. Specification 42 of the Appellant's Motion For New Trial is a part of the record of this case; the Assignment of Errors on the appeal of this cause is that the trial Court erred in over-ruling the Appellant's Motion For New Trial; this specification was included in the Appellant's Brief on the Assignment of Errors as Point 2, Proposition III thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

E. Specification 47 of the Appellant's Motion For New Trial is a part of the record of this case; the Assignment of Errors on the appeal of this cause is that the trial Court erred in over-ruling the Appellant's Motion For New Trial; this specification was included in the Appellant's Brief on the Assignment of Errors as Point 1 of Proposition IV thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

2. The Supreme Court of Indiana erred in holding in its written opinion upon the decision of this case that it

was not error for the trial Court to sustain the demurrer of the appellee to the Appellant's Verified Special Plea of Former Jeopardy for the reasons specified at Point 1 of Proposition I of the Appellant's Brief on the Assignment of Errors on the appeal of this cause.

Respectfully submitted,

Warren Buchanan
John B. McFaddin
Appellant's Attorneys

July ——, 1965

JOHN P. PRICE,
CLEON H. FOUST,
Indianapolis, Indiana,

WARREN BUCHANAN,
JOHN B. McFADDIN,
Rockville, Indiana,
Attorneys for Petitioner.

HOLLOWELL, HAMILL & PRICE,
515 Circle Tower Building,
Indianapolis, Indiana,
Of Counsel.

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